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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,

Appellant,

—v.—

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF OF APPELLANT

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The tax exemption complained of is in violation of the Establishment Clause and the Free Exercise Clause of the First Amendment.

The real property tax exemption involved here is provided by Article 16, Sec. 1 of the New York Constitution and by Sec. 420 of the Real Property Tax Law (App. Br. p. 3).

The tax exemptions provided therein for religious organizations are in violation of the First Amendment, which reads "Congress shall make no law respecting an establishment of religion. . . ." This clause has been interpreted

by this Court in *Everson* v. *Bd. of Education,* 330 U.S. 1, 11, as follows:

> "The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions . . ."
>
> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church" (pp. 15-16).

The dissent of four justices is quoted from in part as follows:

> "It (the First Amendment's object) was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion" (pp. 31-2).
>
> "The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes" (p. 33).

Referring to Madison,

"In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose" (p. 40).

"Legislators are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. . . . The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state" (pp. 52-3).

McGowan v. *Maryland,* 366 U.S. 442: "It (this Court) has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church." The Court then referred to the "establishment of religion" clause definition in *Everson* v. *Board of Education* (330 U.S. 15-16). This opinion was reaffirmed in *Torcasso* v. *Watkins,* 367 U.S. 492-3; in *McCollum* v. *Board of Education,* 333 U.S. 203 and in *Abington* v. *Schempp,* 374 U.S. 217. In *Abington* the concurring opinion of Douglas, *J.,* included: "The most effective way to establish any institution is to finance it" (p. 229).

Mr. Justice Reed declared in *McCollum* v. *Board of Education,* 333 U.S. 203 (1948): "This explains the well-known fact that all churches receive 'aid' from Government in the form of freedom from taxation."

Mr. Justice Douglas in *Engel* v. *Vitale,* 370 U.S. 421 (1962): "The point for discussion is whether the Government can constitutionally finance a religious exercise. Our

system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it an unconstitutional undertaking whatever form it takes."

The expression "funds and facilities" has also been used in this Court to illustrate "Government aid."

"There is no power in our Government to make one bend his religious scruples to the requirements of tax law." Mr. Justice Douglas in *First Unitarian Church* v. *County of Los Angeles,* 357 U.S. 545 (1958).

Appellant's adversaries have cited a number of decisions of this Court striking down licenses, taxes and other encroachments on the exercise of civil liberties: *Speiser* v. *Randall,* 357 U.S. 513 (1958) which involved freedom of speech; *Murdock* v. *Penna.,* 319 U.S. 113 (1943) and *Follett* v. *McCormick,* 321 U.S. 574 (1944) both involving colporteurs; *Sherbert* v. *Verner,* 374 U.S. 405 (1963) involving Sabbath observance; *Grosjean* v. *American Press,* 297 U.S. 233 (1936), involving freedom of the press.

These cases all involved restrictions on civil rights activities, as distinguished from taxation on the ownership of property. This distinction was clearly drawn in *Grosjean.* There Louisiana imposed a tax on advertising in the press. This was held to be an infringement of freedom of the press and the Court concluded: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government."

This applies equally to the property of religious organizations. Ownership of property is not a religious exercise except to devotees of a golden calf cult, which is not within

the purview of the Constitution. Those who listened to the Sermon on the Mount had no roof over them; there was no altar in the garden of Gethsemane; if the Israelites wandered forty years in the wilderness they did not enter a temple. John Wesley preached the Gospel in the fields. If "there are no atheists in foxholes" neither are there any religious edifices.

The Founder of Christianity declared "Wherever two or three are gathered in My name, there am I." Matt. 6:18, 20.

This Court held in *U. S.* v. *Seeger,* 380 U.S. 172: "The Congress considered that a person could be religious without being a member of any church."

Accordingly, the tax exemption complained of herein violates appellant's right of free exercise of religion. It is alleged in the complaint: "the aforesaid tax exemption constitutes an involuntary payment by plaintiff to the aforementioned religious organizations" and "plaintiff is a Christian and not a member of any religious organization as referred to herein, rejecting them as hostile." (Appendix p. 6.)

The First Amendment was made applicable to the states by the Fourteenth according to *Murdock* v. *Penna.,* 319 U.S. 113 (1943).

Appellant's adversaries have not cited a decision of this Court disputing appellant's contentions that the establishment and free exercise clauses, and the Fourteenth Amendment are violated by the tax exemptions of religious organizations.

Considering the optimistic claims of membership of religious organizations and the fact that a high percentage

of their enrollees are minors and housewives, it is apparent that a large majority of individual taxpayers across the land are not members of such organizations; each of them is "similarly situated" as the appellant.

Appellant's adversaries including the attorneys general of thirty-seven states, write reams concerning state constitutions, enactments and public policy and decisions of inferior courts. Again, *Murdock* holds that the Fourteenth Amendment made the First applicable to the States. They also advance the theory that if unconstitutionality can be prolonged sufficiently it becomes transformed into constitutionality. The fallacy of this argument has been demonstrated recently in the case of the housing laws. As Mr. Justice Brandeis once observed: "A constitutional question is not settled until it is settled right." There is also the factor that until recently taxpayers lacked "standing," *Flast* v. *Cohen,* 392 U.S. 83 (1968), due to the doctrine of separation of powers.

Then there is the chorus quoting the hackneyed declaration "the power to tax is the power to destroy" without quoting the qualification of Mr. Justice Holmes: "Not while this Court sits."

There is an attempt on the part of appellee's *amicus* United States Catholic Conference (pp. 13-14) to classify "religion"; it proclaims that there are two, namely worship and worship and charity. The federal Constitution makes no mention of any classification. It does not mention charity or education, which are public purposes; it mentions "religion," which is a private purpose, and the framers had abundant reason for placing it first in the Bill of Rights.

Religious organizations pay for the land they acquire and the construction thereon; they pay for the maintenance thereof in all respects as private property—except taxes, taxes which make government possible, which makes all their material things possible. Their pretensions to being charitable seem incompatible with their accumulated wealth, variously estimated at up to one hundred eighty billions, according to Liberty, Nov.-Dec. 1969 (inside cover). There is also the fact, that, including dependents, there must be nearly one million who derive their living directly from organized religion. While most probably live on a moderate scale, and some spartan-like, there are others who, like the rich man in the Bible, are "clad in purple and fine linen and fare sumptuously every day."

It is estimated that the annual tax avoidance by religious organizations approximates five point two billions.

The religious organizations' claims to moral teaching are largely mythical, taken all in all. Of course, individuals, whether laity or clergy or outside organizations, influence others by their exemplary conduct (as illustrated in appellant's Reply affidavit in the trial court, Appendix, pp. 22-23). A brief review of the history of American religious organizations in this regard is in order.

Beginning with the execution of Quakers by Puritans and the hanging and pressing of "witches" in Massachusetts (in obedience to Exodus) there followed the turmoil of the 19th century. The negro question was taken up by them in a manner which spread consuming hatred throughout the land, destroying Lincoln's practical solutions and precipitating the war. Writing of General Sherman's devastation of the South, Episcopal bishop Philips Brooks (composer of "O Little Town of Bethlehem") wrote "Isn't

Sherman a peach?" The greater part of the century witnessed nation-wide violence and vituperation visited upon Catholics by Protestants—not without grave provocation by Irish Catholic bishops who predicted publicly that they would gain dominion over the land (Carleton Beals, Brass Knuckle Crusade).

Early in this century the Episcopal Church opposed New York's tenement house laws because of its ownership of slums. Catholic clergy opposed New York's child labor law because it would interfere with the Old Testament notion of parental authority (in the New Testament there is a drastic warning to those "who would harm one of these littleones" and a mandate to "care for the widow and orphan"). Earlier, Baptists and Methodists combined to impose the Volstead Act on the nation, ushering in an area of unparalleled corruption.

Came World War I and they reached a new peak of hatemongering (Ray H. Abrams, "Preachers Present Arms"). Their repeat performance in World War II is still fresh in the minds of most adults.

Now they have many irons in the legislative fires to gain public money for their private purposes. Catholics and orthodox rabbis oppose humane abortion and birth control (Old Testament: "be fruitful and multiply"); they oppose humane slaughtering of meat animals (Exhibit A hereof); they oppose "mixed marriages" and some forbid burial in non-sectarian cemeteries. Mormons preach the Old Testament blessing of polygamy and God-accursedness of the Negro race. Ministers curry favor with minority interests by referring to Christians as "gentiles"; clergy teach the faulty translation "lead us not into temptation"—creating a cruel god in their own image. They seem to ignore the

Gospel of John and 1 Cor. 13. "Howbeit in vain do they worship Me, teaching for doctrines the commandments of men"; Mark 7:7.

There is a flight from this reality. Press accounts report more than five thousand "underground" churches in this land—groups who meet informally in homes and other private places for religious purposes in the manner of the first Christians. In France a whole class has sprung up called the "working clergy," priests who earn their living at the side of wage-earners and the movement is reported spreading in Turin. Here rent-paying storefront congregations dot the slums. On the Sunday morning following this Court's announcement of noting probable jurisdiction herein the radio spokesman for the Council of Churches of the City of New York said over Station WOR: "Tax exemption of churches has for some time been suspect, morally and theologically." And youth refuses to "put new wine into old bottles." The American Council of Churches, including several million Lutherans, Baptists, et al., and other religious bodies are not opposing this appeal. (See Exhibit B, hereof.)

In 1967, on the eve of the New York constitution referendum, all Catholic bishops, supported by the orthodox rabbinate, issued pastoral letters calling upon their followers to vote for the proposed new constitution which would open the way for public funds for parochial schools and yeshivas. The subservient politicians in convention assembled had approved the proposed new constitution by a two to one vote; the voters in the heavily Catholic-Jewish populated state defeated it by a vote of five to two.

CONCLUSION

The order of the New York Court of Appeals should be reversed.

Respectfully submitted,

FREDERICK WA[illegible]
Appellant pro se

New York City, November 11, 1969.

EXHIBIT A

NEW YORK DAILY NEWS, Tuesday, March 19, 1967

WRANGLE ON KOSHER SLAUGHTER

A conflict between Hebrew law and the concept of humane treatment of animals started a shouting match yesterday at a meeting called by Friends of the Animals Inc.

The session, at the Carnegie Endowment Building, 345 E. 46th St., was to be a discussion of the kosher method of slaughtering called "shackling and hoisting," in which a fully conscious animal is hung by one of his ankles while waiting to have his throat cut.

The discussion centered around two bills pending in the Legislature, both of which would change the methods of slaughtering animals, and which would prohibit shackling and hoisting of various animals.

Opponents of the bills claim any change in the kosher slaughtering laws would constitute an interference with a religious practice.

Part of the shouting erupted when author Fannie Hurst told the meeting "there is no longer any need for kosher killing." She said, "It no longer has profound meaning."

A noisy argument erupted between Bronx Assemblyman Seymour Posner, who opposes legislation against the kosher method of slaughtering, and William Gottlieb, a spokesman for the *American Council for Judaism, an anti-Zionist organization.*

Gottlieb, claiming *the hoisting and shackling "was never part of the historic religious practice,"* accused Posner of being uninformed.

Posner said he could not support either of the bills because he opposes any legislation interfering with religious

beliefs and ritual practices. He said those beliefs and practices should be determined by the practitioners of the affected religions.

By Sigismund Goren

Staff Correspondent of The News

Tel Aviv, March 19 (Special)—Some "problem" couples, unable to marry here because of age-old taboos strictly enforced by the Israeli rabbinate, have found a short cut to matrimony: marriage by letter—from Mexico.

The proxy marriages are seen as one solution for Israelis who are in a bind because of the rabbinate's exclusive jurisdiction in matters of personal status, and the lack of civil marriage in Israel.

"Helps Break Monopoly"

Here nationality is identified with religion, and the child of a Christian mother has no legal standing unless the mother converts to Judaism and remarries her husband.

Intermarriage is usually impossible here between Jews and gentiles, Jews and Karaites (a Jewish sect which was excommunicated about 10 centuries ago for rejecting rabbinical law), or Jews and Samaritans (another Jewish sect considered heretical).

EXHIBIT B

CAMDEN, N.J. EVENING BULLETIN, October 22, 1969

PRESBYTERIANS TO STUDY TAX EQUIVALENTS

Ocean City—(AP)—The United Presbyterian Synod of New Jersey has accepted a recommendation to find ways that its churches may contribute the equivalent of taxes to communities.

The recommendation in a report by a special committee on tax exemption of church property was made at the 147th annual meeting of the synod here yesterday.

It proposed that the tax-exempt churches "do their fair share in defraying public neighborhood expenditures."

Local Discussion

The nearly 800 delegates at the meeting, representing about 400 churches, agreed that the state's seven Presbyteries should discuss locally ways of contributing to the municipalities in which the churches are located.

The synod recommended that committees be set up to determine the fair value of public service received by church property and recommend ways in which the communities could be reimbursed.

The United Presbyterian Church has a membership of about 207,000 in the state. The congregation's national membership is 3,258,751 with 8,887 individual congregations.

Legislative Commission

A state legislative commission currently is studying whether state law should be revised to require taxation of churches and other tax-exempt organizations. The commission, created a year ago, hopes to report to the legislature early in 1970.